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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CENTRO LEGAL DE LA RAZA;
IMMIGRANT LEGAL RESOURCE CENTER;
TAHIRIH JUSTICE CENTER; REFUGEE
AND IMMIGRANT CENTER FOR
EDUCATION AND LEGAL SERVICES,

Plaintiffs,

v.

EXECUTIVE OFFICE FOR IMMIGRATION
REVIEW; JAMES MCHENRY, Director,
Executive Office for Immigration Review;
UNITED STATES DEPARTMENT OF
JUSTICE; MONTY WILKINSON, Acting
United States Attorney General,

Defendants.

Case No. 3:21-cv-00463-CRB

**BRIEF OF *AMICI CURIAE* 28 CITIES
AND COUNTIES IN SUPPORT OF
PLAINTIFFS' MOTION FOR A
PRELIMINARY INJUNCTION**

Hearing Date: March 4, 2021
Time: 10:00 a.m.
Courtroom: 6, 17th Floor
Judge: Hon. Charles R. Breyer

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INTEREST OF *AMICI CURIAE*

Amici are home to hundreds of thousands of immigrants and immigrant families, who are integral to the social fabric and future of *Amici's* communities. Immigrants contribute more than \$3 trillion GDP nationwide, and during the COVID-19 pandemic, immigrant workers have helped sustain essential sectors.¹ Immigrants also create jobs and build opportunities for others, including 2.8 million jobs in Los Angeles County alone.² And immigrants support families throughout the United States, with over 13 million U.S. citizen children depending on an immigrant parent.³

Amici recognize that it is critical to the well-being of the entire community to protect immigrants and their families from unjust removals of immigrant residents and to help immigrants to assert valid claims for immigration benefits or for relief from removal. For this reason, *Amici* have invested in a variety of initiatives to keep immigrants rooted in their communities, from citizenship classes at public libraries to direct legal services to help immigrants who otherwise could not afford representation in the visa application process or in removal proceedings.

But the challenged rule, *Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure*, 85 Fed. Reg. 81588 (Dec. 16, 2020) (the Rule), harms these interests. The Rule strips important due process protections from immigrants who appear in immigration court and before the Board of Immigration Appeals (BIA), which in turn will mean that more immigrants' cases will be wrongly decided and more immigrants will be unable to assert, or to have immigration courts consider, valid bases for relief from removal or valid claims to immigration benefits. The Rule will thus cut off immigrants' ability to receive relief for which they otherwise would be eligible.

Fair process in immigration proceedings can have life or death consequences for *Amici's* immigrant residents and significant social and economic consequences for *Amici*. Access to a fair process and procedures through which the court can consider or reconsider immigrants' claims can

¹ Raul Hinojosa-Ojeda et al., *Essential but Disposable: Undocumented Workers and their Mixed-Status Families, Modeling COVID-19 Economic Impacts and Government Relief Policies by Race and Immigration Status in Los Angeles County, California, and the United States*, UCLA N. Am. Integration & Development Ctr. & Mexican Instituto Nacional de Estadística y Geografía 10, 20 (Aug. 10, 2020), <https://irle.ucla.edu/wp-content/uploads/2020/08/Essential-Undocumented-Workers-Final-w-Cover.pdf>.

² *Id.* at 23.

³ *Id.* at 18.

mean the difference for many immigrant residents between being separated from their families and returned to a country where they may be killed, or living in safety and contributing to *Amici's* communities. Fair process and procedures also help protect *Amici's* investments in legal services and ensure effective representation for immigrant residents, thereby promoting the future prosperity of *Amici's* communities. The Rule severely undercuts *Amici's* investments in immigrant legal services and endangers *Amici's* families and communities by eroding procedural protections for immigrants in removal proceedings. The Rule is also contrary to *Amici's* interests in preventing arbitrary and capricious decisionmaking and protecting all residents from unlawful violations of their due process rights under the Fifth Amendment. For these reasons, the Rule should be enjoined.

ARGUMENT

Amici adopt and concur in Plaintiffs' legal arguments and write separately to urge the Court to enjoin the Rule because of its harmful ramifications on local governments and communities like *Amici's*, and because the Rule is arbitrary and capricious and violates immigrants' due process rights.

The Rule's several procedural changes will preclude immigrants from raising valid claims for relief and will demand greater resources from advocates providing removal defense. As a result, many immigrants will be removed despite the potential for immigration relief. This will gravely harm local communities: children in *Amici's* communities who depend on immigrant parents will suffer the life-long trauma of family separation; *Amici* will lose vital contributors to their economies and cultural life; and *Amici's* significant investments in removal defense will be frustrated because as each case demands further resources, *Amici* will be able to serve fewer immigrants in need of representation.

The Rule also violates the Administrative Procedures Act (APA), 5 U.S.C.A. § 551 *et seq.*, and immigrants' due process rights. The Executive Office for Immigration Review (EOIR) failed to acknowledge the practical ramifications of the Rule on local economies and communities—even after *Amici* raised these concerns to EOIR in public comments. This failure renders the Rule arbitrary and capricious. The Rule's heightened procedural burdens also violate immigrants' due process rights by unjustifiably depriving them of their right to raise valid claims for immigration relief. For these reasons, along with those raised by Plaintiffs, this Court should enjoin the Rule.

I. THE RULE WILL HARM *AMICI*'S COMMUNITIES AND FRUSTRATE THEIR INVESTMENTS IN PROTECTING IMMIGRANT RESIDENTS

A. By Imposing Severe Procedural Burdens, The Rule Will Lead To The Unjust Removal Of Immigrants With Valid Claims For Relief From *Amici*'s Communities

The Rule imposes procedural burdens on immigration court and BIA proceedings that will inevitably result in the unjust and unfair removal of immigrants who otherwise would be eligible for relief. *First*, the Rule generally precludes administrative closure, a tool often used to put removal proceedings on hold so that immigrants can pursue alternative relief from U.S. Citizenship and Immigration Services (USCIS). 85 Fed. Reg. at 81590-91. *Second*, the Rule limits the ability of the BIA and immigration judges (IJs) to remand or reopen a case, even where a potential avenue for relief subsequently becomes available. *Id.* at 81589-90. *Third*, the Rule shortens the timeline for appeals, which will hinder advocates' ability to present a full defense and prompt hasty dismissals. *Id.* at 81588, 91-92. Each of these procedural restrictions will hurt residents in *Amici*'s communities who have valid claims for relief that will be more difficult for them to assert and for courts to consider.

1. The Rule Precludes the BIA and IJs from Administratively Closing Cases, Effectively Foreclosing Immigrants from Pursuing Alternative Humanitarian Relief

The Rule's elimination of most uses of administrative closure will result in harsh consequences for the most vulnerable immigrants. Administrative closure has long been a crucial tool for the BIA and IJs to ensure just results for immigrants in removal proceedings who are eligible for forms of humanitarian relief over which USCIS has exclusive jurisdiction—including children who are pursuing Special Immigrant Juvenile Status (SIJS), crime victims pursuing U-visas, trafficking victims pursuing T-visas, and others. The BIA and IJs historically have used administrative closure to pause removal proceedings while immigrants pursue their applications with USCIS. *See Romero v. Barr*, 937 F.3d 282, 286-87 (4th Cir. 2019). These applications sometimes take considerable time for USCIS to decide, for reasons that are no fault of the immigrants who apply.

If the BIA and IJs cannot administratively close removal proceedings, many immigrants eligible for humanitarian relief will be effectively cut off from receiving such relief. The consequences could be devastating, as applications for humanitarian relief provide an important path to protection for many vulnerable immigrants from unsafe conditions in their native countries. For

example, in Los Angeles County, Catherine, a 15-year-old orphaned girl, pursued SIJS status because she had been trafficked by her aunt in Guatemala and would face grave risk of harm if removed there.⁴ Catherine is building a safe life in Los Angeles where she can pursue her education and contribute to the County's economy and community. The Los Angeles Justice Fund is helping Catherine and nearly 100 applicants like her apply for humanitarian relief.

Without administrative closure, applicants like these could face removal before their applications have been processed *even though they are eligible for humanitarian relief*, and even though administrative closure for years provided an effective and efficient way for immigration courts to allow time for these applications to be considered. The Rule's elimination of this critical procedural mechanism will thrust many immigrants back into the life-threatening situations they struggled to escape, for no reason other than a lack of inter-agency coordination.

2. The Rule Limits the Ability of the BIA and IJs To Remand and Reopen Cases, Even Where Relief Has Become Available or Where Immigrants Could Be Removed in Error

The Rule also sets forth one-sided restrictions on the ability of the BIA or IJs to remand or reopen cases that will prevent immigrants from receiving relief if they become eligible because of a change in law or fact. The BIA and IJs generally have used remand and reopening to allow a deficient record to be further developed, to consider new facts that come to light, and to reevaluate claims if there is a pertinent change in law. But the Rule precludes the BIA from using remand for further fact-finding or issue development, except to allow the *government* to introduce facts *in support* of removal. 85 Fed. Reg. at 81589-90. The Rule also would remove the BIA's and IJs' ability to reopen or reconsider a decision *sua sponte* if a change in law or fact arises after the 90-day deadline that immigrants have to move to reopen their case. *Id.* at 81591.

The Rule thus strips the BIA and IJs of the ability to respond to new circumstances that could open a path to immigration relief. Restrictions on remand and reopening will hurt immigrants like Cynthia, a mother of three U.S. citizen children who has lived in Los Angeles County for over 15

⁴ L.A. Cty. Dep't of Consumer & Business Affairs, *Two-Year Report – Legal Representation for Los Angeles County Residents Facing Removal* 100 (Feb. 24, 2020) ("LAJF Report").

1 years, and who is seeking asylum on the basis of domestic violence with the help of the Los Angeles
 2 Justice Fund.⁵ The legal test for asylum claims premised on domestic violence has shifted
 3 throughout the course of her proceedings and continues to change.⁶ If there is a further change in
 4 law that requires Cynthia to make a new showing to support her case when it is already on appeal, the
 5 BIA would need the discretion to remand to allow her to demonstrate her eligibility for relief.
 6 Otherwise, Cynthia could be removed from her children, despite a potentially meritorious claim for
 7 relief.

8 Restrictions on remand and reopening also will prevent immigrants from presenting valid
 9 claims for immigration relief in the first instance. Mr. A, an indigenous man who has lived in the
 10 United States for 15 years with his wife and U.S. citizen child and who fears returning to his home
 11 country because of his ethnicity, hired a man known to be a lawyer in his community after being
 12 detained. In fact, the man had been disciplined for the unauthorized practice of law. The New York
 13 Legal Assistance Group took on Mr. A's case, filed an appeal with the BIA, and argued that Mr. A
 14 had been defrauded and prevented from filing an asylum application. The BIA remanded and Mr. A
 15 was released pending a final hearing on his asylum claim. Had Mr. A's case been filed after the Rule,
 16 however, he would not have been able to present his claim for asylum.

17 If the BIA and IJs cannot remand or reopen a case to allow new evidence or changed legal
 18 circumstances, many immigrants will be removed for no reason other than poor luck and timing.
 19 Instead of receiving the relief for which they are eligible, these immigrants will be uprooted from
 20 their families and communities and returned to the precarious conditions from which they fled.

21 **3. The Rule Condenses the Timeline for Appeal, Preventing Effective** 22 **Representation and Favoring Hasty Dismissals**

23 The Rule compresses the timeline for appellate proceedings, which will burden advocates as
 24 well as the BIA. The Rule imposes a simultaneous, rather than consecutive, briefing schedule for
 25 immigration appeals and reduces the maximum allowable extension from 90 days to only 14 days. 85
 26 Fed. Reg. at 81588. This simultaneous briefing schedule is a significant departure from almost every
 27 other appellate adjudication system in the United States and will require immigrants' advocates to

28 ⁵ *Id.* at 97.

⁶ *Id.*

1 brief arguments without understanding how the government has framed the issue. In order to reply
 2 to the government's arguments, advocates will have to rely on the 14-day extension, which in practice
 3 likely will only allow 9-10 days for drafting the brief because of common delays in mail service. This
 4 compressed timeline will make appeals highly resource-intensive and will limit immigrants' ability to
 5 respond to arguments made by the government for their removal. Thus, immigrants will not have
 6 the ability to present their claims fully before the BIA.

7 The Rule also shortens the BIA's time to evaluate appeals. The Rule requires the BIA to
 8 evaluate appeals for summary dismissal within 14 days; issue decisions on summary dismissals within
 9 30 days; and take no more than 90 days to issue a final decision on most other appeals. *Id.* at 81591-
 10 92. This compressed timeframe will increase pressure to review cases quickly rather than accurately
 11 and thus will result in higher rates of erroneous removals of immigrants whose appeals required more
 12 searching review. Especially when combined with a simultaneous briefing schedule that deprives the
 13 BIA of full briefing by the advocates of each others' arguments, the BIA will return higher rates of
 14 removal, including in cases where the immigrant had a valid claim for relief. These higher rates will
 15 not reflect the merits of the cases, but rather the Rule's arbitrary constraints.

16 **B. When Immigrants Are Unfairly Denied Procedural Safeguards And Unjustly**
 17 **Removed, Local Communities, Like *Amici*, Suffer**

18 The Rule will lead to the removal of immigrants who have valid defenses and claims for relief
 19 because its procedural changes prevent immigrants from presenting those valid defenses and claims
 20 for relief. These avoidable removals will cause harmful ripple effects throughout local communities,
 21 including *Amici*. *First*, children in mixed-status families will suffer detrimental effects from the
 22 removal of an immigrant parent, which in turn will dampen their future potential and contribution to
 23 their communities. *Second*, local economies will suffer as they lose the contribution of valuable
 24 immigrant workers. *Third*, local governments that have invested in removal defense will serve fewer
 25 immigrants because the Rule demands greater resources to serve each client.

26 **1. The Rule Will Lead to Increased Family Separation, Which Will Result**
 27 **in Long-Term Harm to Children in Local Communities**

28 The Rule will lead to the removal of immigrants who have resided in the United States for
 several years and built families here. Nationwide, over 50 million people live in mixed-status

families—in which some members are U.S. citizens or lawful permanent residents and some members are undocumented immigrants—including over 13 million U.S. citizen children. In Los Angeles County alone, roughly one third of all County residents live in a noncitizen or mixed-status family.⁷ Nearly 60 percent of County children—over 1.2 million children total—have at least one immigrant parent, and 44 percent of County households are headed by an immigrant.⁸ In San Francisco, approximately 54 percent of children have at least one immigrant parent, and 34 percent of households are headed by an immigrant.⁹ Nearly 60 percent of New Yorkers share households with at least one immigrant, including about one million in mixed-status households.¹⁰ These families, particularly children, depend on their immigrant members for their continued well-being.

Children will suffer traumatic and lifelong consequences when immigrant parents are unjustly removed from their families as a result of the Rule’s procedural restrictions. Children in mixed-status families already accumulate a psychological toll living under the ever-present threat that a parent could be removed.¹¹ If parents are removed from their families, the children are even more likely to experience toxic stress, which negatively impacts brain development and leads to the development of mental health conditions such as depression and post-traumatic stress disorder, as well as physical conditions such as cancer, stroke, diabetes, and heart disease in adulthood.¹² Poorer health and

⁷ See *Public Charge Proposed Rule: Potentially Chilled Population Data Dashboard*, MANATT (Oct. 11, 2018), <https://www.manatt.com/Insights/Articles/2018/Public-Charge-Rule-Potentially-Chilled-Population>.

⁸ *Los Angeles*, Ctr. for the Study of Immigrant Integration, USC Dornsife College of Letters, Arts & Sciences, https://dornsife.usc.edu/assets/sites/731/docs/LOSANGELES_web.pdf (last visited Jan. 25, 2021).

⁹ *San Francisco*, Ctr. for the Study of Immigrant Integration, USC Dornsife College of Letters, Arts & Sciences, https://dornsife.usc.edu/assets/sites/731/docs/SANFRANCISCO_web.pdf (last visited Jan. 28, 2021).

¹⁰ New York City Office of Civil Justice, *Annual Report 13* (2019) (“NYC OCJ Report”).

¹¹ Luis H. Zayas & Laurie Cook Hefron, *Disrupting Young Lives: How Detention and Deportation Affect US-Born Children of Immigrants*, Am. Psychological Ass’n (2016), <https://www.apa.org/pi/families/resources/newsletter/2016/11/detention-deportation>.

¹² Am. Immigration Council, *U.S. Citizen Children Impacted by Immigration Enforcement* (Nov. 22, 2019), <https://www.americanimmigrationcouncil.org/research/us-citizen-children-impacted-immigration-enforcement>.

educational outcomes for these children in turn will lead to reduced potential for future success.¹³ This will harm not only these children, but also the local communities like *Amici* that benefit from their success. When children achieve greater educational outcomes, particularly college graduation, this translates to wage increases for everyone in the work force, faster GDP growth, and greater investment in local goods and services.¹⁴ The Rule harms these interests, however, by increasing unjust removals of parents from their children.

2. The Rule Will Harm *Amici*'s Economies and Communities as More Immigrants Face Unjust Removal

Amici also will lose the economic and social contributions of the immigrants who are unjustly removed. Nationwide, 23 million immigrant workers contribute over \$3 trillion in GDP and nearly \$6 trillion in total economic output.¹⁵ In Los Angeles County, immigrant workers constitute one third of the total labor force; contribute \$251 billion to the gross state product, \$452 billion in economic output, and \$75.8 billion in taxes; and support 2.8 million jobs.¹⁶ In the San Francisco area, immigrants comprise 37 percent of the labor force,¹⁷ and approximately 41 percent of Bay Area business owners in 2018 were immigrants.¹⁸ In New York City, immigrants account for 43 percent of the city's work force and nearly one third of the total gross product, and they contribute over \$1 billion in state and local taxes.¹⁹

¹³ Sophia Koropecj, et al., Am. Acad. of Arts & Sciences, The Economic Impact of Increasing College Completion 21 (2017), https://www.amacad.org/sites/default/files/publication/downloads/CFUE_Economic-Impact.pdf (demonstrating a correlation between higher rates of college graduation and GDP growth).

¹⁴ *Id.*; Enrico Moretti, U.C. Berkeley Dep't of Econs., Social Returns to Education and Human Capital Externalities: Evidence from Cities 1 (1998), [http://darplse.ac.uk/PapersDB/Moretti_\(98\).pdf](http://darplse.ac.uk/PapersDB/Moretti_(98).pdf); Jonathan Rothwell, The Brookings Institute, What Colleges Do for Local Economies: A Direct Measure Based on Consumption (2015), <https://www.brookings.edu/research/what-colleges-do-for-local-economies-a-direct-measure-based-on-consumption/>.

¹⁵ Hinojosa-Ojeda, *supra* note 1, at 20.

¹⁶ *Id.* at 20, 22-23.

¹⁷ Jamila Henderson, et al. *A Profile of Frontline Workers in the Bay Area*, Bay Area Equity Atlas, <https://bayareaequityatlas.org/essential-workers> (last visited Jan. 28, 2021).

¹⁸ *Immigrants in California*, Am. Immigration Council, https://www.americanimmigrationcouncil.org/sites/default/files/research/immigrants_in_california.pdf (last visited Jan. 28, 2021).

¹⁹ Jennifer Stave, et al., *Evaluation of the New York Immigrant Family Unity Project* 55, Vera Inst. of Justice (Nov. 2017), [new-york-immigrant-family-unity-project-evaluation.pdf](https://www.vera-institute.org/new-york-immigrant-family-unity-project-evaluation) ("NYIFUP Report"); Office of

Undocumented immigrants, in particular, are making significant contributions to local economies and communities, despite great hardship. Undocumented workers generate \$500 billion in labor income and contribute over \$1 trillion to the GDP, even though they are disproportionately concentrated in the lowest-paying jobs.²⁰ Throughout the COVID-19 pandemic, nearly 80 percent of undocumented immigrants have worked in essential sectors.²¹ Refugees—who have fled violence in their home countries—soon build roots in their new communities and contribute \$22 billion in net fiscal benefits to state and local governments.²² Indeed, research has shown that refugees and migrants provide substantial benefits to their host countries: a 2018 study that analyzed 30 years of data from Western Europe concluded that after spikes in immigration, host countries' economies improved and unemployment rates dropped.²³

If vital members of local communities are removed when they otherwise could have been eligible for relief, their loss will be felt throughout *Amici's* communities. Los Angeles County will lose residents like Daniel, an immigrant who was paralyzed from the waist down in a violent shooting and who now volunteers at rehabilitation centers and teaches students in medical schools about living with a disability. With the help of the Los Angeles Justice Fund, Daniel was able to have his removal order terminated, but only after his case was reopened when an IJ read the outpouring of letters of support from the community commending Daniel's character, volunteerism, and civic spirit.²⁴ Had the Rule been in place, the IJ would not have been able to consider Daniel's significant civic contributions and reopen his case *sua sponte*, and the County would have lost his contributions.

the New York State Comptroller, *The Role of Immigrants in the New York City Economy* (Nov. 2015), <https://www.osc.state.ny.us/sites/default/files/reports/documents/pdf/2018-11/report-7-2016.pdf>.

²⁰ Hinojosa-Ojeda, *supra* note 1, at 15, 21.

²¹ *Id.* at 10.

²² See National Immigration Forum, *Immigrants as Economic Contributors: Refugees Are a Fiscal Success Story for America* (June 14, 2018), <https://immigrationforum.org/article/immigrants-as-economic-contributors-refugees-are-a-fiscal-success-story-for-america/>.

²³ Amy Maxmen, *Migrants and Refugees Are Good For Economies*, *Nature* (June 20, 2018) <https://www.nature.com/articles/d41586-018-05507-0> (summarizing the results of a study by the Paris School of Economics).

²⁴ LAJF Report, *supra* note 4, at 97.

3. The Rule Undermines *Amici*'s Investments in Removal Defense

The Rule will undercut *Amici*'s significant investments to support direct legal services to immigrants who cannot afford representation. Because *Amici* recognize the vital importance of immigrant residents to their families and local communities, several have made significant investments in pro bono legal services for immigrants. Los Angeles County and the City of Los Angeles, for example, have jointly invested \$5 million dollars in the Los Angeles Justice Fund.²⁵ New York City has invested nearly \$60 million annually through multiple legal services programs, including the New York Immigrant Family Unity Project, the first publicly funded legal services program specifically for detained immigrants.²⁶ San Francisco has invested over \$11.1 million in immigration legal defense²⁷ to help sustain programs like the San Francisco Public Defender's Immigration Unit and the San Francisco Legal Defense Collaborative.²⁸

Amici's investments help their communities, including by serving long-time residents, children, families with U.S. citizen children, and immigrants who are particularly vulnerable. New York City's Family Immigrant Unity Project has represented over 1,500 immigrants who had lived in the United States for over 15 years on average and who are parents to nearly 2,000 children in the United States.²⁹ New York City's Immigrant Child Advocates' Relief Effort represents over 2,500 immigrant youth in removal proceedings annually.³⁰ The Los Angeles Justice fund has served over 500 clients, who on average had lived in the County for over a decade and over 80 percent of whom

²⁵ *Id.* at 8.

²⁶ NYC OCJ Report, *supra* note 10, at 37. Other programs include the Immigrant Opportunity Initiative, which provided legal assistance in over 15,000 complex cases in 2019, including removal defense, *id.* at 13, 36; the Immigrant Child Advocates' Relief Effort, which serves unaccompanied minor children, *id.* at 37-38; and the Rapid Response Legal Collaborative, which provides emergency assistance to those at imminent risk of deportation who may not have the right to see an IJ or otherwise are facing a fast-track to removal, *id.* at 14.

²⁷ Press Release, San Francisco Office of the Mayor, Mayor Mark Farrell, Assemblymember Phil Ting and Supervisor Sandra Lee Fewer Announce Funding Efforts to Provide Universal Representation for Detained Northern California Immigrants (Mar. 1, 2018).

²⁸ *Immigration Unit*, San Francisco Public Defender, <https://sfpublicdefender.org/services/immigration-unit/> (last visited Jan. 28, 2021); *Why We're Here*, S.F. Immigrant Legal Defense, <https://sfildc.org> (last visited Jan. 28, 2021).

²⁹ NYIFUP Report, *supra* note 19, at 5, 10, 20.

³⁰ NYC OCJ Report, *supra* note 10, at 36-37.

1 were eligible for fear-based protections or asylum.³¹ Twenty-four percent of the immigrants served
 2 were children at the time Los Angeles Justice Fund attorneys first began to represent them.³²

3 These local initiatives have been extremely successful: Forty-eight percent of immigrants
 4 represented by the Los Angeles Justice Fund or New York Immigrant Family Unity Project have
 5 achieved positive outcomes in their cases, compared with only four to five percent of immigrants
 6 without legal representation—up to an 1100 percent increase in success.³³ And what that success
 7 means is that immigrants who successfully assert a valid claim for immigration benefits or a valid
 8 claim of relief from removal are able to remain with their families and contribute to *Amici's*
 9 communities. Indeed, New York City's provision of legal representation to immigrants in removal
 10 proceedings has led to hundreds of workers gaining or maintaining work authorization, translating
 11 into nearly \$1 million in additional state and local tax revenue.³⁴

12 But *Amici's* local initiatives do not come close to meeting demand. The Los Angeles Justice
 13 Fund could provide representation to less than a third of the immigrants who were screened in
 14 consultations.³⁵ An average case can demand between 15 and 20 attorney hours per month.³⁶

15 The Rule will drastically increase the hours and expense of each removal defense by adding
 16 new procedural hurdles. By eliminating administrative closure, the Rule will remove a key tool for
 17 managing dockets and force advocates to devote additional hours to manage proceedings before
 18 USCIS and EOIR simultaneously. The Rule's condensed timeline for appeals will prevent attorneys
 19 from managing multiple cases effectively because with simultaneous briefing and only a 14-day
 20 extension, advocates will need to concentrate more attention per case in the short-term. The Rule's
 21 restrictions on remand and reopening also will mean that advocates must devote more time and
 22 resources to each case to try to ensure, as best possible, that issues are preserved for appeal. Under
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 24

25 ³¹ LAJF Report, *supra* note 4, at 4, 8.

26 ³² *Id.* at 4.

27 ³³ *Id.*; NYIFUP Report, *supra* note 19, at 9.

28 ³⁴ NYIFUP Report, *supra* note 19, at 58.

³⁵ LAJF Report, *supra* note 4, at 4.

³⁶ *Id.* at 30.

these additional pressures, the legal services organizations in which *Amici* have invested will be forced to reduce the number of clients they serve in order to provide effective representation.

II. THE RULE SHOULD BE ENJOINED BECAUSE IT VIOLATES THE APA AND THE CONSTITUTION'S DUE PROCESS CLAUSE

A. The Rule is Arbitrary And Capricious Because EOIR Failed To Consider The Unique Harms The Rule Would Cause Local Governments

The Rule is arbitrary and capricious because it was promulgated without consideration of the severe ramifications on families, the future prosperity of local communities, and local governments' investments in removal defense that *Amici* set forth above. *First*, the Rule failed to consider the important reliance interests of immigrants' families and children, whose livelihoods and prospects for long-term success depend on family unity. *Second*, the Rule did not consider the reliance interests of local communities, like *Amici*, whose economies rely on the contributions of immigrant residents and whose government systems depend on the trust of immigrant communities. *Third*, the Rule did not consider the reliance interests of locally funded immigrant legal services organizations, who have limited resources and whose core missions will be undercut by the Rule.

When an agency fails to consider important impacts of a rule or serious reliance interests that are harmed by a change in policy, it is arbitrary and capricious in violation of the APA. "Federal administrative agencies are required to engage in 'reasoned decisionmaking.'" *See Michigan v. E.P.A.*, 576 U.S. 743, 750 (2015). An agency action is arbitrary and capricious where the agency has "entirely failed to consider an important aspect" of the issue before it. *See Motor Vehicle Mfrs. Ass'n of U.S. Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Particularly where an agency changes established rules and procedures in the immigration context, it must consider a variety of reliance interests, not only the interests of the directly impacted immigrants, but also the consequences for their families and the local governments that rely on their contribution. *See Immigrant Legal Res. Ctr. v. Wolf*, 2020 WL 5798269, at *15-16 (N.D. Cal. Sept. 29, 2020) (rejecting Department of Homeland Security's argument that an agency need only consider the reliance interests of those "directly affected" by a proposed action, and finding that the interests of legal services organization plaintiffs who served asylum applicants affected by a rule change must be considered); *see also Pangea Legal Servs. v. U.S. Dep't of Homeland Sec.*, 2020 WL 6802474, at *16 (N.D. Cal. Nov. 19, 2020).

1 Indeed, just months before Defendants promulgated the Rule, the Supreme Court ruled that
 2 an agency *must* consider the consequences of a rule not only on those directly affected, but also on
 3 others in their families and communities, along with local governments like *Amici*. In June 2020 in
 4 *Department of Homeland Security v. Regents of the University of California*, 140 S. Ct. 1891 (2020), the Court
 5 ruled that rescission of the DACA program—another Trump Administration attack on immigrants—
 6 was arbitrary and capricious in part because DHS did not consider the consequences that “would
 7 radiate outward to DACA recipients’ families, including their 200,000 U.S.-citizen children . . . [and]
 8 States and local governments [that] could lose \$1.25 billion in tax revenue each year.” 140 S. Ct. at
 9 1914 (internal quotation marks omitted).

10 Here too, EOIR entirely ignored the potential harm to local communities when it finalized
 11 the Rule—even after these concerns were put before EOIR in public comments. Los Angeles
 12 County, for example, detailed at length how local governments would be harmed by the unjust
 13 removal of valuable members of their communities and how the County’s significant investment in
 14 immigrant legal services would be undercut. New York City and the City of Minneapolis similarly
 15 explained how the Rule would harm their local economies, undermine their investments in removal
 16 defense, and damage immigrant communities’ trust in the legal system and other public systems. Yet,
 17 the finalized Rule did not acknowledge any of these potential harms.

18 Rather, EOIR’s response to public comments simply stated, without explanation, that the
 19 Rule’s procedural changes complied with statutory and constitutional rights, and EOIR failed to
 20 implement any substantive changes to address local governments’ concerns. *See* 85 Fed. Reg. at
 21 81592-81649. EOIR did not engage with local governments’ concern that families and children will
 22 suffer when immigrants are unjustly removed. EOIR also failed to address the concern that local
 23 communities will be harmed by the removal of immigrants who contribute to their economies and
 24 civic and cultural life. And EOIR did not even acknowledge, much less consider, the harm to legal
 25 services organizations. Because EOIR failed to engage with the consequences for immigrants, their
 26 families, their communities, and local governments like *Amici* that “would radiate outward” from the
 27 Rule’s procedural changes, the Rule is arbitrary and capricious. *Regents*, 140 S. Ct. at 1914.

B. The Rule Also Violates Immigrants' Due Process Rights

The Rule also is unlawful because it will deny immigrants the full and fair proceedings they are guaranteed by the Due Process Clause. The Constitution's Due Process Clause protects immigrants in removal proceedings and guarantees them the right to fair proceedings. *See Zadhydas v. Davis*, 533 U.S. 678, 693-94 (2001). To evaluate the constitutional sufficiency of proceedings, courts weigh three factors: (1) the significance of the interest at stake to the individual who is subject to the proceedings; (2) the risk that the individual will be erroneously deprived that interest as a result of the procedures; and (3) the government's interest in using the challenged procedures instead of additional or different procedures. *See Landon v. Plasencia*, 459 U.S. 21, 34 (1982); *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). A rule that violates the Due Process Clause should be enjoined on that basis and also because it is "contrary to constitutional right" in violation of the APA. 5 U.S.C. § 706(2)(B).

As to the first factor, the Rule undoubtedly implicates "the loss of a significant liberty interest" because "deportation 'visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom.'" *Flores-Chavez v. Ashcroft*, 362 F.3d 1150, 1161 (9th Cir. 2004), citing *Bridges v. Wixon*, 326 U.S. 135, 154 (1945). For particularly vulnerable immigrants seeking fear-based protections or humanitarian relief, the interest at stake "could hardly be greater." *Oshodi v. Holder*, 729 F.3d 883, 894 (9th Cir. 2013).

As to the second factor, the Rule's severe restrictions on appellate procedures will significantly increase the risk of erroneous removal of immigrants otherwise eligible for relief. Without administrative closure, many immigrants in removal proceedings will be unjustly deported despite their applications for humanitarian and other immigration relief from USCIS. *See supra* I.A.1; *Romero*, 937 F.3d at 286-87 (noting that administrative closure primarily has been used to allow immigrants in removal proceedings to seek relief from USCIS for which they may be eligible). And without procedural protections like discretion to remand or reopen cases, many immigrants who would have been able to demonstrate eligibility for relief will not be able to present their case. *See supra* I.A.2. Indeed, the Rule makes illusory the very benefits and grounds for relief that are written into the immigration law: it blocks the efficacy of benefits like SIJS, U-visas, T-visas, and VAWA visas because under the Rule, even immigrants who qualify for these visas will not be able to benefit

1 from them because the Rule's changes will block immigrants from pursuing these grounds for
2 relief.³⁷

3 Third, the government's so-called efficiency interest does not justify the need for the Rule's
4 restricted procedures, rather than past procedures or alternatives that are more protective of
5 immigrants' significant liberty interests. Although EOIR claims that the Rule serves its interests in
6 "ensur[ing] the consistency, efficiency, and quality of [immigration] adjudications," 85 Fed. Reg. at
7 81588, the Rule will serve none of these interests. The Rule will undermine rather than further the
8 quality of immigration adjudication because it will lead to the unnecessary removal of immigrants
9 who otherwise would be eligible for immigration relief. *Cf. J.G. v. Warden, Irwin Cty. Detention Ctr.*,
10 2020 WL 6938013, at *7 (M.D. Ga. Nov. 16, 2020) (noting that the government's interest should be
11 avoiding, rather than increasing, unnecessary detention of immigrants in removal proceedings
12 because this wastes taxpayers' money and harms judicial efficiency). The Rule will not yield
13 consistency because changes in substantive immigration law will apply only to cases that are
14 proceeding before an IJ, as the BIA will have limited ability to remand for reconsideration. 85 Fed.
15 Reg. at 81591. Finally, the elimination of administrative closure will undercut efficiency by removing
16 a crucial tool for the BIA and IJs to manage their dockets; indeed, since EOIR has attempted to
17 restrict administrative closure, the backlog of immigration cases has only continued to skyrocket.³⁸
18 EOIR simply fails to demonstrate that the Rule will promote its interests better than past procedures.
19 To the extent the Rule promotes some efficiency, "mere 'administrative burden' alone cannot
20 ordinarily serve as a rationale for outweighing serious due process rights to fair adjudications."
21 *Penobscot Air Servs., Ltd. v. Fed. Aviation Admin.*, 164 F.3d 713, 724 n.8 (1st Cir. 1999); *see also Fuentes v.*
22 *Shevin*, 407 U.S. 67, 90 n.22 (1972) ("Procedural due process is not intended to promote efficiency.").
23 In short, EOIR cannot justify the Rule's disregard for immigrants' due process rights.

24 CONCLUSION

25 *Amici* respectfully request that this Court grant Plaintiffs' motion and enjoin the Rule.

26 ³⁷ See Elizabeth Montano, *The Rise and Fall of Administrative Closure in Immigration Courts*, 129 Yale L.J.
27 F. 567, 579-81 (2020) (describing how administrative closure protects the rights of immigrants
28 applying for humanitarian relief including U-visa applications).

³⁸ See *id.* at 567, 579.

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